No. 11067

In the United States Circuit Court of Appeals for the Ninth Circuit

JAMES MILLER, JAKE AND MARJORIE CROPLEY, FRANK AND LILLY EDWARDS, WILLIE PETERS, JIMMIE JACK, DAVID WILLARD, HERBERT MERCER, SUSIE MICHAELSON, MARY JOHNSON, LILLY YARQUAN, EDWARD N. AND CECELIA KUNZ, JENNIE KLANEY, JESSIE WILSON, JACOB YARKON, BESSIE VISAYA, JIMMIE K. HANSON, MARY GEORGE, PAUL RUDOLPH, WILLIAM KUNZ, AND LILLY HOOLIS, APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

UPON APPEAL FROM THE DISTRICT COURT FOR THE TERRITORY OF ALASKA, DIVISION NUMBER ONE

BRIEF FOR THE UNITED STATES

J. EDWARD WILLIAMS,
Acting Head, Lands Division,
Department of Justice.

R. L. TOLLEFSEN,
Acting United States Attorney,
Ketchikan, Alaska.

ROGER P. MARQUIS,
JOHN C. HARRINGTON,
Attorneys, Department of Justice,
Washington, D. C.

INDEX

CITATIONS

681362—46——1

In the United States Circuit Court of Appeals for the Ninth Circuit

No. 11067

JAMES MILLER, JAKE AND MARJORIE CROPLEY, FRANK AND LILLY EDWARDS, WILLIE PETERS, JIMMIE JACK, DAVID WILLARD, HERBERT MERCER, SUSIE MICHAELSON, MARY JOHNSON, LILLY YARQUAN, EDWARD N. AND CECILIA KUNZ, JENNIE KLANEY, JESSIE WILSON, JACOB YARKON, BESSIE VISAYA, JIMMIE K. HANSON, MARY GEORGE, PAUL RUDOLPH, WILLIAM KUNZ, AND LILLY HOOLIS, APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

UPON APPEAL FROM THE DISTRICT COURT FOR THE TERRITORY OF ALASKA, DIVISION NUMBER ONE

BRIEF FOR THE UNITED STATES

OPINION BELOW

The district court's opinion appears in the record at pages 16–17.

JURISDICTION

This is an appeal from a final judgment entered in a condemnation proceeding on March 20, 1945, and determining that appellants had no compensable inter-

est in the property condemned (R. 19–23). A petition for appeal was filed on March 23, 1945, and was allowed on March 28, 1945 (R. 24–26). The jurisdiction of the district court was invoked under section 4 of the Act of June 16, 1900, 31 Stat. 321, as amended (48 U. S. C. sec. 101), and the Act of August 18, 1890, 26 Stat. 316, as amended by the Acts of July 2, 1917, 40 Stat. 241, April 11, 1918, 40 Stat. 518, and the Second War Powers Act of March 27, 1942, 56 Stat. 177 (50 U. S. C., Supp. IV, sec. 171 (a)). The jurisdiction of this Court is invoked under Section 128 of the Judicial Code, as amended, 28 U. S. C. sec. 225 (a).

QUESTIONS PRESENTED

1. Whether the United States may extinguish aboriginal Indian title without liability for just compensation.

2. Whether, in any event, appellants could prevail in this condemnation proceeding inasmuch as—

a. Any claim of Indian title had been extinguished prior to the filing of this proceeding;

b. Appellants filed their answer and claim as individuals rather than on behalf of the tribe.

STATUTES AND TREATIES INVOLVED

The pertinent portions of the statutes and treaties involved are set forth in the Appendix, pp 22–26, *infra.*

STATEMENT

On September 19, 1942, pursuant to the Second War Powers Act of March 27, 1942, 56 Stat. 177, c. 199, sec. 201 (50 U. S. C., Supp. IV, sec. 171 (a)),

the United States filed a petition for the condemnation in fee of 10.95 acres, including land under water, for use in the establishment of wharfage facilities in connection with the Juneau Subport of Embarkation (R. 33–39). Various individuals, not including appellants, were listed as presumptive owners of the tract (R. 36–37). One of these individuals, a Mr. Femmer, had erected a wharf on the tract under the authority of a revocable permit from the United States; and the others, without any apparent legal authority, had erected commercial buildings and claimed the right to use and occupy the land (R. 6). Subsequently, on April 3, 1944, the Government filed a third amended petition in which it was alleged that the lands involved were tidelands, title to which was and always had been in the United States; that, with the exception of Femmer, the named individuals had entered upon the property and erected their improvements without authority of law; and that, with the possible exception of the Femmer wharf, all the improvements were the property of the United States, so that no compensation was due therefor (R. 6). In addition to the previously named individuals, all persons claiming any interest in the land were made parties defendant (R. 7). It was prayed that the defendants be required to set forth the nature of their claims, and that the court determine the validity of such claims and the amount of compensation, if any, to which any of the defendants might be entitled (R. 8).

Thereafter, on July 27, 1944, appellants filed an answer (R. 10–15) denying that title was in the

United States as alleged in the amended petition. As an affirmative defense and claim appellants, describing themselves as Tlingit Indians of Alaska, alleged that from time immemorial they and their predecessors had been and now were the aboriginal occupants of and entitled to the exclusive possession of a defined area, including the tidelands described in the petition for condemnation, and that such aboriginal title had in no way been extinguished or impaired prior to the filing of the condemnation proceeding (R. 11–12).[1] They claimed damages in the total sum of $80,000 for the taking of the lands described in the petition for condemnation and for the reduction in value of contiguous lands (R. 13–14).

The United States demurred to the answer and claim on the ground that it appeared from the pleading that appellants had no such interest in the property condemned as would entitle them to compensation (R. 15). On March 9, 1945, Judge Alexander filed an opinion indicating that the demurrer would be sustained because aboriginal title created no compensable interest as against the United States (R. 16–17), and on March 16, 1945, an order to that effect was entered (R. 17–18). Appellants having elected to stand on the allegations of their answer, the court on March

[1] In their answer appellants expressly waived any claim to that portion of the area in which were located buildings erected by some of the named defendants (R. 13), and upon stipulation of the interested parties this portion of the area was dismissed from the condemnation proceeding (see R. 20). After the judgment appealed from was entered, appellants also disclaimed any interest in the lands occupied by the Femmer Wharf and its appurtenances, so that only land under water is now involved.

20, 1945, filed its final judgment in which it was decreed that title to the lands in question was in the United States at the time the suit was filed, that appellants had no compensable interest against the United States, and that title be quieted in the United States against all claims of appellants (R. 19–23). On March 23, 1945, appellants filed a notice of appeal (R. 23–24), and on the same day filed a petition for appeal, which was allowed on March 28, 1945 (R. 24–26).

ARGUMENT

I

The United States is not liable to make compensation for the extinguishment of unrecognized Indian title

The sole basis of appellants' claim for compensation in this case is the allegation of aboriginal Indian title by virtue of occupancy, possession and use of the lands in controversy from time immemorial (R. 11–12).[2] It is the Government's position that, unless formally recognized or acknowledged by the ruling sovereign in such manner as to amount to a guarantee of a permanent right of occupancy, aboriginal Indian title or temporary right of occupancy may be extinguished by the United States without any liability to compensate the Indians. Appellants do

[2] Thus, although their answer purports to deny the allegation of the Government's title as made in the petition (R. 6, 10), it is clear that appellants, at least impliedly, have acknowledged the title of the United States, for one of the attributes of Indian title is that the fee title is actually in the sovereign, while the Indians have merely a right of occupancy. *Shoshone Tribe* v. *United States*, 299 U. S. 476, 496 (1937); *United States* v. *Cook*, 19 Wall. 591 (1873).

not contend that their Indian title had been so recognized by either Russia or the United States, but rather they rely upon the assumption that such recognition is immaterial (See Appellants' Brief, p. 7).

It is true, as the Supreme Court held in *United States* v. *Santa Fe Pacific R. Co.,* 314 U. S. 339, 347 (1941), that Indian title, whether or not formally recognized by the sovereign, is to be protected against the acts of others than the United States. However, the Supreme Court at the same time pointed out, "Extinguishment of Indian title based on aboriginal possession is of course a different matter. The power of Congress in that regard is supreme. The manner, method and time of such extinguishment raise political, not justiciable, issues. * * * And whether it be done by treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy, or otherwise, its justness is not open to inquiry in the courts." Thus, "since *Johnson* v. *M'Intosh,* 8 Wheat. 543, decided in 1823, gave rationalization to the appropriation of Indian lands by the white man's government, the extinguishment of Indian title by that sovereignty has proceeded, as a political matter, without any admitted legal responsibility in the sovereign to compensate the Indian for his loss."[3] *Shoshone Indians* v. *United States,* 324

[3] After this statement by the Supreme Court, for the first time in any court it was held by the Court of Claims that unrecognized Indian title could not be extinguished by the United States without the payment of just compensation. *Alcea Band of Tillamooks* v. *United States* (not yet officially reported), 59 F. Supp. 934 (1945). The Government's petition for certiorari was granted

U. S. 335, 339 (1945). From these statements of the Supreme Court and from an analysis of the historical development of the concept of Indian title, it is plain that appellants' claim of unrecognized Indian title does not represent an interest in the lands in controversy for which compensation must be paid.

Principles of international law have been deemed to require a sovereign to respect private rights in property when acquiring sovereignty by conquest or cession over territory occupied by another member of the family of nations. *Barker* v. *Harvey,* 181 U. S. 481, 486 (1901). On the other hand, as Chief Justices Marshall and Taney pointed out, all territory not in the possession of states who are members of the family of nations has been deemed open to occupation by the discovering nation, and title to such territory has vested in the occupying sovereign by virtue of the discovery. *Johnson* v. *M'Intosh,* 8 Wheat. 543, 573 (1823); *Martin* v. *Waddell,* 16 Pet. 367, 409–410 (1842). Lawrence, Principles of International Law (7th ed., 1923) pp. 148–149; Story, Commentaries on the Constitution of the United States (5th ed., 1891) pp. 106–107; Moore, International Law Digest (1906) pp. 258–259. Thus, when the European nations came to North America and found it inhabited by uncivilized Indians, it was unanimously agreed by the nations, in accordance with principles of international law as understood by

---

on October 22, 1945 (No. 387, October Term 1945) and the case has been calendared for argument during the session of Court beginning on January 28, 1946.

681362—46——2

the then civilized powers of Europe, that each should have exclusive title by discovery to all territory reduced to possession. *Johnson* v. *M'Intosh, supra,* pp. 572–592; *Martin* v. *Waddell, supra.* However, in order to placate the warlike and numerically superior Indian tribes and their own consciences, the Europeans treated their own exclusive title as subject to the temporary occupancy of the Indians. Until the Indian right of occupancy was extinguished, the sovereign granted the fee of the lands in the New World subject to the Indian right of occupancy, the colonists were forbidden to take possession of lands occupied by Indians without tribal consent, and the natives were permitted to use such lands according to their own discretion. *Fletcher* v. *Peck,* 6 Cranch 87, 141–142 (1810); *Johnson* v. *M'Intosh, supra,* pp. 572–584; *Martin* v. *Waddell, supra,* p. 409.

This temporary right of occupancy has come to be known as aboriginal Indian title. *Shoshone Indians* v. *United States,* 324 U. S. 335, 338–339 (1945); *United States* v. *Santa Fe Pacific R. Co.,* 314 U. S. 339, 345 (1941). But, although this Indian title was considered to be as sacred as the fee insofar as interference by private individuals was concerned, nevertheless the European sovereigns, and later the United States, claimed the paramount right to extinguish the Indian right of occupancy at will by treaty, purchase, the sword, or the exercise of complete dominion adverse to the right of occupancy. *Fletcher* v. *Peck,* 6 Cranch 87, 142 (1810); *Johnson* v. *M'Intosh,* 8 Wheat. 543, 587–592 (1823); *Clark* v. *Smith,* 13 Pet. 195, 201

(1839); *Martin* v. *Waddell,* 16 Pet. 367, 409 (1842); *Buttz* v. *Northern Pacific Railroad,* 119 U. S. 55, 66 (1886); *United States* v. *Santa Fe Pacific R. Co.,* 314 U. S. 339, 347 (1941); *Shoshone Indians* v. *United States,* 324 U. S. 335, 339 (1945). In its dealings with aboriginal Indian title, as Mr. Justice Holmes has stated, the United States "bound itself only by honor, not by law." *Conley* v. *Ballinger,* 216 U. S. 84, 90 (1910); see also *The Sac and Fox Indians,* 220 U. S. 481, 489 (1911); *United States* v. *Old Settlers,* 148 U. S. 427, 469 (1893); *Beecher* v. *Wetherby,* 95 U. S. 517, 525 (1877); cf. *Cummings* v. *Deutsche Bank,* 300 U. S. 115 (1937).

In essence, the sovereign claimed full ownership of the lands occupied by the Indians under their aboriginal title and merely permitted as a matter of grace a continuance of the Indian occupancy until it was desired to put such lands to other uses. However unjust it may seem that the Indians were thus unwillingly or even unknowingly deprived of their rights in the soil, that is a political matter to be determined by Congress and not by the courts. *Johnson* v. *M'Intosh,* 8 Wheat. 543, 572, 589–592 (1823); *Worcester* v. *Georgia,* 6 Pet. 515, 543 (1832). As stated by Lawrence, Principles of International Law (7th ed., 1923), p. 148, "The rights of the natives are moral, not legal." Cf. *Conley* v. *Ballinger,* 216 U. S. 84, 90 (1910). Hence, it is plain that the Indians' rights under aboriginal title are in all material respects no greater than their rights in reservations carved from the public domain by executive order, which rights can

be terminated at any time without liability. *Sioux Tribe* v. *United States,* 316 U. S. 317 (1942). Since appellants' claim is based solely on unrecognized Indian title (R. 11), the United States is under at most only a moral obligation to make compensation for their rights, if any, which may have been taken in this condemnation proceeding. In the absence of a legal obligation, it is clear that the court below correctly sustained the demurrer to appellants' answer and claim on the ground that they had no compensable interest as against the United States.

There is much language in the reported opinions which, if taken to apply to aboriginal Indian title as well as to recognized Indian title, would support the view that the United States could not extinguish aboriginal title without incurring the liability of paying just compensation. But when the distinctions between recognized and unrecognized title are kept in mind, it becomes clear that these cases are not contrary to the Government's position here. From the beginning, the European sovereigns, in order to obtain protection against the Indians and each other, entered into treaties of alliance with the Indians and in some instances promised them a perpetual right to occupy defined areas free from interference by the whites. After independence the United States followed the same policy of making treaties with various tribes, so that at a very early date most of the Indian lands were held under a treaty recognized right of occupancy. *Worcester* v. *Georgia,* 6 Pet. 515, 546–550 (1832); *Mitchel* v. *United States,* 9 Pet. 711, 745–756

(1835); *Beecher* v. *Wetherby,* 95 U. S. 517, 525 (1877); *Shoshone Tribe* v. *United States,* 299 U. S. 476, 496 (1937). When by treaty or Act of Congress the United States has guaranteed to Indians the perpetual and exclusive right to occupy a defined area, the Indians have thereby acquired a vested property right in such lands which is protected by the Fifth Amendment and cannot be taken by the United States without the payment of just compensation. This is so even though the United States has an unlimited power to manage and control the lands, and the Indians could not dispose of such lands to others without governmental consent. *Chippewa Indians* v. *United States,* 301 U. S. 358, 375–376 (1937); *United States* v. *Klamath Indians,* 304 U. S. 119 (1938); *Shoshone Tribe* v. *United States,* 299 U. S. 476, 497 (1937); *United States* v. *Creek Nation,* 295 U. S. 103, 109–110 (1935).

But merely because it has been the policy of the ruling sovereign to enlarge upon the Indian right of occupancy and create vested property rights, it does not follow that the aboriginal Indian title is to be transformed into some greater right when the sovereign has not specifically done so. There is nothing inconsistent in the fact that some tribes at one time had merely a temporary right of occupancy and later a permanent right, or that some tribes have never had anything but a temporary right subject to extinguishment at the will of the sovereign. The distinction has always been maintained. *Barker* v. *Harvey,* 181 U. S. 481, 491–492 (1901); *Shoshone Indians*

v. *United States*, 324 U. S. 335, 338–339 (1945). A plain indication of the difference between recognized and unrecognized Indian title is given in *Barker* v. *Harvey*, 181 U. S. 481 (1901), where claimants under a patent from the United States in confirmation of Mexican grants prevailed over Mission Indians of California who claimed rights by virtue of aboriginal possession, it having been found that Mexico had never recognized the Indian title (p. 499). It was there stated (pp. 491–492):

> * * * it could not well be said that lands which were burdened [by Mexican recognition] with a right of permanent occupancy were a part of the public domain and subject to the full disposal of the United States. There is an essential difference between the power of the United States over lands to which it had full title, and of which it has given to an Indian tribe a temporary occupancy, and that over lands which were subjected by the action of some prior government to a right of permanent occupancy, for in the latter case the right, which is one of private property, antecedes and is superior to the title of this government, and limits necessarily its power of disposal.

Here is a clear statement of the paramount distinction between recognized and unrecognized Indian title. Plainly, aboriginal possession creates against the United States only a temporary right of occupancy which can be terminated at will without liability. As the Court of Claims stated in *Duwamish et al. Indians* v. *United States*, 79 C. Cls. 530, 600 (1934), certiorari denied 295 U. S. 755:

> We are of the opinion that this court is without jurisdiction in a case between tribal Indians and the United States for the recovery of the alleged value of lands thrown open to public settlement by an act of Congress, in the absence of a treaty or an act of Congress recognizing the Indians' title by right of occupancy to the same. The special jurisdictional acts do not confer such jurisdiction [citation omitted] and the issue is a political and not a judicial one.[4]

Besides the distinction between recognized and unrecognized Indian title, the difference in the rights of the Indians against the United States and against other persons must be considered in any analysis of the numerous opinions dealing with Indian title. For example, in many cases it has been stated that the Indian "right of occupancy is considered as sacred as the fee simple of the whites." See *Mitchel* v. *United States*, 9 Pet. 711, 746 (1835); *Cherokee Nation* v. *Georgia*, 5 Pet. 1, 48 (1831); *United States* v. *Cook*, 19 Wall. 591, 593 (1873); *Leavenworth &c. R. R. Co.* v. *United States*, 92 U. S. 733, 755 (1875); *Beecher* v. *Wetherby*, 95 U. S. 517, 526 (1877); *United States* v. *Santa Fe*

---

[4] In *Alcea Band of Tillamooks* v. *United States*, 59 F. Supp. 934, 964–965 (1945), the Court of Claims attempted to explain the quoted language from the *Duwamish* case on the ground that the special jurisdictional act in that case "did not authorize the prosecution of a claim based on aboriginal Indian title." However, the jurisdictional act involved (set out at 79 C. Cls. 532) authorized the adjudication of "all claims of whatever nature both legal and equitable" which certain named tribes "with whom no treaty has been made" might have. It is submitted, therefore, that the decision in the *Alcea* case is directly contrary to that of the *Duwamish* case, and that in any event the view expressed in the *Duwamish* case is the correct one. See footnote 3, *supra*.

Pacific R. Co., 314 U. S. 339, 345 (1941). However, in none of these cases was there involved a controversy between Indians and the United States, and the Court was referring to the Indians' rights against others than the Federal Government. Cf. *Lone Wolf* v. *Hitchcock*, 187 U. S. 553, 565 (1903). Moreover, with the exception of the *Santa Fe* case, all the cases cited involved a treaty-recognized right of occupancy. In cases where the controversy was between the United States and the Indians, the Court has been careful to indicate that it is the "pledged" or "perpetual" right of occupancy which is as sacred as the fee. *United States* v. *Shoshone Tribe*, 304 U. S. 111, 116 (1938); *Shoshone Tribe* v. *United States*, 299 U. S. 476, 497 (1937). The importance of the distinction between parties is further illustrated by *United States* v. *Santa Fe Pacific R. Co.*, 314 U. S. 339, 347 (1941), where, after holding that formal recognition was immaterial when private persons were involved, the Court stated, "Extinguishment of Indian title based on aboriginal possession is of course a different matter. The power of Congress in that regard is supreme."

The fact that, as against others than the sovereign, aboriginal Indian title has been protected by the courts is not derogatory of the principle that the United States might extinguish such title at will. The protection afforded against private individuals is merely a corollary to the principle that none but the sovereign could disturb the Indians' occupancy. Cf. *Johnson* v. *M'Intosh*, 8 Wheat. 543, 573 (1823). Merely be-

cause the Indians had rights protected by the courts against actions of others than the sovereign, it does not follow that they had any enforceable rights against the United States. The resulting situation is not unique in the application of public land laws and is comparable to the position of stockmen and settlers who were allowed to graze cattle or settle upon the public lands before such lands were thrown open to homesteading or purchase. These stockmen and settlers, although recognized as having acquired rights against other private individuals, did not acquire any vested rights against the United States or its grantees. *Frisbie* v. *Whitney,* 9 Wall. 187 (1869); *Northern Pacific Railroad Co.* v. *Smith,* 171 U. S. 260 (1898); *Tarpey* v. *Madsen,* 178 U. S. 215 (1900); *Russian-American Co.* v. *United States,* 199 U. S. 570 (1905); *Light* v. *United States,* 220 U. S. 523 (1911); *Osborne* v. *United States,* 145 F. 2d 892 (C. C. A. 9, 1944). The Indians by virtue of their unrecognized aboriginal title had no greater rights in the lands they occupied as against the United States than did these stockmen and settlers.

II

In any event appellants cannot prevail in this condemnation proceeding

Even if it should be held that the United States may not extinguish unrecognized aboriginal Indian title without the payment of compensation, there remain other independent reasons why appellants could not prevail in this condemnation proceeding, so that

the sustaining of the demurrer to their answer and claim was proper.

A. *Any Indian title that may have existed in Alaska was extinguished long prior to the filing of this condemnation proceeding.*—By the Treaty of March 30, 1867, 15 Stat. 539, Russia ceded to the United States all the "territory and dominion" possessed by Russia in Alaska. Article II provided that the "right of property in all public lots and squares, vacant lands, and all public buildings, fortifications, barracks, and other edifices which are not private individual property" were included in the cession. In Article VI it was further provided that the cession was "declared to be free and unencumbered by any reservations, privileges, franchises, grants, or possessions * * * by any parties, except merely private individual property holders." For this last provision the United States agreed to pay an additional $200,000.00 as consideration. See *Kinkead* v. *United States,* 150 U. S. 483, 486 (1893). It is clear, therefore, that by the treaty the United States acquired the complete title to all the land in Alaska except for the rights of private individuals. By no stretch of the imagination can Indian title be considered the equivalent of private individual property. Cf. *Choate* v. *Trapp,* 224 U. S. 665, 671–672 (1912); *Cherokee Nation* v. *Hitchcock,* 187 U. S. 294, 307 (1902); *Cherokee Trust Funds,* 117 U. S. 288, 308–309 (1886). Hence, it follows that, if there ever was any Indian title in Alaska, it had been extinguished by Russia prior to the treaty or at the latest at the time of the cession.

The course of dealings with the Alaska Indians confirms this view. The United States never attempted to enter into treaties for the extinguishment of aboriginal title and the establishment of reservations within the larger areas claimed by the tribes as it had done in the case of the American Indians. See Cohen, Handbook of Federal Indian Law (1942), p. 405. On the other hand, whenever authority has been given for the establishment of reservations, Congress has provided for setting aside lands from the public domain. See Section 10 of the Act of May 14, 1898, 30 Stat. 409, 413; Section 2 of the Act of May 1, 1936, 49 Stat. 1250; Act of May 31, 1938, 52 Stat. 593. However, the Alaska Indians were not made homeless by virtue of the cession from Russia. For a short time they were left to their own devices, but by Section 8 of the Act of May 17, 1884, 23 Stat. 24, 26, which established a land district and made the mining laws of the United States effective in Alaska, it was provided that the Indians and other settlers were not to be "disturbed in the possession of any lands actually in their use or occupation," but that the terms under which they might acquire title to such lands were reserved for future legislation by Congress. Section 12 of the same Act provided for a commission to investigate and report as to what lands, if any, should be reserved for the use of Indians, and what rights by occupation of settlers should be recognized. Plainly, the Indians and the white settlers were considered upon an equal footing with respect to possessory

rights in the lands of the Territory,[5] and neither the Indians nor the white settlers obtained any vested rights against the United States by virtue of the 1884 Act. *Malony* v. *Adsit,* 175 U. S. 281, 289 (1899); cf. *Frisbie* v. *Whitney,* 9 Wall. 187 (1869). The citizen settlers were taken care of by the extension of the homestead laws to Alaska in the Act of May 14, 1898, 30 Stat. 409, 48 U. S. C. sec. 371, while the Act of May 17, 1906, 34 Stat. 197, 48 U. S. C. sec. 357, authorized the allotment of 160 acres to native Indians as homesteads, with a preference right to the land already occupied by the natives.

Moreover, since the lands in issue are tidelands,[6] there are still stronger indications of the understanding that aboriginal title did not exist with respect to such lands. By section 2 of the Act of May 14, 1898, 30 Stat. 409, it was declared that title to all tidelands was held by the United States in trust for the people of any State or States to be later created, and that nothing in the Act should be construed as impairing the right of the United States to resume possession of such lands. Section 10 of the same act directed

---

[5] Thus, Indian possessory rights, like those of the white settlers, depended upon the Act of May 17, 1884, rather than on aboriginal possession. *United States* v. *Lynch,* 7 Alaska 568, 572 (1927); cf. *Worthern Lumber Mills* v. *Alaska Juneau G. Min. Co.,* 229 Fed. 966 (C. C. A. 9, 1916); *Heckman* v. *Sutter,* 119 Fed. 83 (C. C. A. 9, 1902), on rehearing 128 Fed. 393; *United States* v. *Berrigan,* 2 Alaska 442 (1905).

[6] Although appellants' answer purports to deny that the lands in question are tidelands (R. 10; see R. 6), they acknowledged in their brief in the trial court that "only compensation for tidelands is involved." See also Appellants' Brief in this Court, p. 6.

the Secretary of the Interior to reserve for the natives suitable tracts along the shores for landing places for their canoes and other craft. Surely, there would have been no necessity to reserve such areas if the Indians had aboriginal title in the areas. Manifestly, therefore, the whole course of dealings with the lands in Alaska negatives the idea of the existence of aboriginal title at any time after the cession in 1867.

B. *Appellants, as individuals, have no standing to prosecute a claim based on Indian title.*—Appellants, describing themselves as Tlingit Indians of Alaska, apparently claim by virtue of aboriginal possession from time immemorial a right of occupancy in themselves as individuals and seek to recover compensation for themselves rather than on behalf of the tribe as a whole (R. 11, 13–14).[7] However, it is well settled that rights such as claimed by appellants, being tribal and communal in nature, are in the tribe rather than in the individual members. *Conley* v.

[7] It is to be noted that appellants do not base their claim on either Section 8 of the Act of May 17, 1884, 23 Stat. 24, 26, or Section 14 of the Act of March 3, 1891, 26 Stat. 1095, 1100, which provide that the Indians are not to be disturbed in the possession of lands actually in their use and occupation. Such a claim would perhaps confer greater rights on claimants as individuals than a claim based on possession from time immemorial. Cf. *United States* v. *Lynch*, 7 Alaska 568, 572–573 (1927); *United States* v. *Lynch*, 7 Alaska 643 (1927). However, neither the 1884 nor 1891 Acts would vest in individual claimants any rights against the sovereign. *Russian-American Co.* v. *United States*, 199 U. S. 570 (1905); *Malony* v. *Adsit*, 175 U. S. 281, 289 (1899); *Frisbie* v. *Whitney*, 9 Wall. 187 (1869); *Heckman* v. *Sutter*, 128 Fed. 393, 397 (C. C. A. 9, 1904).

Ballinger, 216 U. S. 84, 90 (1910); *Cherokee Nation* v. *Hitchcock,* 187 U. S. 294, 307 (1902); *Cherokee Trust Funds,* 117 U. S. 288, 308–309 (1886); cf. *United States* v. *Lynch,* 7 Alaska 568, 575–576 (1927). See Cohen, Handbook of Federal Indian Law (1942), pp. 183–185, 287–289.[8] Even when individual members are permitted exclusive occupancy of portions of the tribal lands, they do not thereby acquire any vested rights against either the tribe or the United States. Until the tribal lands are allotted in severalty under the auspices of the United States so that the members have acquired a title in themselves, the individual members have no enforceable rights in the tribal property as against the United States. *Choate* v. *Trapp,* 224 U. S. 665, 671–672 (1912); *United States* v. *Chase,* 245 U. S. 89, 92, 96, 100 (1917); *Chase, Jr.* v. *United States,* 256 U. S. 1, 7 (1921). Payment to the individuals would not discharge the Government's obligation to the tribe. Cf. *Shoshone Tribe of Indians* v. *United States,* 82 C. Cls. 23, 92–93 (1935), reversed on other grounds 299 U. S. 476 (1937). It is clear, therefore, that if the United States must make compensation for the taking of the lands here in question, the claim therefor should be made by or on behalf of the tribe. Accordingly, having filed claim as individuals (R. 10–11) and having elected to stand on the allegations of their

[8] *Cramer* v. *United States,* 261 U. S. 219 (1923) is not to the contrary. In that case neither tribal lands nor occupancy from time immemorial were involved. Rather, the individual Indians had taken possession of the lands after acquisition by the United States with the implied consent of the Government.

answer and claim (R. 22), appellants have no standing to prosecute a claim in this condemnation proceeding.

CONCLUSION

It is submitted, therefore, that the judgment of the court below should be affirmed.

Respectfully.

J. EDWARD WILLIAMS,
Acting Head, Lands Division,
Department of Justice,
Washington, D. C.

R. L. TOLLEFSEN,
Acting United States Attorney,
Ketchikan, Alaska.

ROGER P. MARQUIS,
JOHN C. HARRINGTON,
Attorneys, Department of Justice,
Washington, D. C.

JANUARY 1946.

APPENDIX

1. Pertinent portions of the Treaty of March 30, 1867, 15 Stat. 539, are as follows:

* * *

ARTICLE I

His Majesty, the Emperor of all the Russias agrees to cede to the United States, by this convention, immediately upon the exchange of the ratifications thereof, all the territory and dominion now possessed by his said Majesty on the continent of America and in the adjacent islands * * *.

ARTICLE II

In the cession of territory and dominion made by the preceding article are included the right of property in all public lots and squares, vacant lands, and all public buildings, fortifications, barracks, and other edifices which are not private individual property. It is, however, understood and agreed, that the churches which have been built in the ceded territory by the Russian government, shall remain the property of such members of the Greek Oriental Church resident in the territory, as may choose to worship therein. * * *.

ARTICLE III

The inhabitants of the ceded territory, according to their choice, reserving their natural allegiance, may return to Russia within three years; but if they should prefer to remain in the ceded territory, they, with the exception of uncivilized native tribes, shall be admitted to the enjoyment of all the rights, advantages, and immunities of citizens of the United States,

and shall be maintained and protected in the free enjoyment of their liberty, property, and religion. The uncivilized tribes will be subject to such laws and regulations as the United States may, from time to time, adopt in regard to aboriginal tribes of that country.

* * * * *

ARTICLE VI

* * *. The cession of territory and dominion herein made is hereby declared to be free and unencumbered by any reservations, privileges, franchises, grants, or possessions, by any associated companies, whether corporate or incorporate, Russian or any other, or by any parties, except merely private individual property holders; and the cession hereby made, conveys all the rights, franchises, and privileges now belonging to Russia in the said territory or dominion, and appurtenances thereto.

* * * * *

2. The pertinent portions of the Act of May 17, 1884, 23 Stat. 24, are as follows:

* * * * *

SEC. 8. That the said district of Alaska is hereby created a land district, and a United States land office for said district is hereby located at Sitka. * * * and the laws of the United States relating to mining claims, and the rights incident thereto, shall, from and after the passage of this act, be in full force and effect in said district * * *: *Provided,* That the Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress: * * *. *And provided also,* That the land not exceeding six hundred and forty acres at any station now occupied as missionary stations

among the Indian tribes in said section, with the improvements thereon erected by or for such societies, shall be continued in the occupancy of the several religious societies to which said missionary stations respectively belong until action by Congress. But nothing contained in this Act shall be construed to put in force in said district the general land laws of the United States.

* * * * *

SEC. 12. That the Secretary of the Interior shall select two of the officers to be appointed under this act, who, together with the governor, shall constitute a commission to examine into and report upon the condition of the Indians residing in said Territory, what lands, if any, should be reserved for their use, what provision shall be made for their education, what rights by occupation of settlers should be recognized, and all other facts that may be necessary to enable Congress to determine what limitations or conditions should be imposed when the land laws of the United States shall be extended to said district; * * *.

3. The Act of May 14, 1898, 30 Stat. 409, provides in part as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the homestead land laws of the United States and the rights incident thereto * * * are hereby extended to the District of Alaska, subject to such regulations as may be made by the Secretary of the Interior; * * * *Provided*, That no entry shall be allowed extending more than eighty rods along the shore of any navigable water, and along such shore a space of at least eighty rods shall be reserved from entry between all such claims, and that nothing herein contained shall be so construed as to authorize entries to

be made, or title to be acquired, to the shore of any navigable waters within said District: *And it is further provided,* That no homestead shall exceed eighty acres in extent.

SEC. 2. * * * *Provided,* That nothing in this Act contained shall be construed as impairing in any degree the title of any State that may hereafter be erected out of said District, or any part thereof, to tidelands and beds of any of its navigable waters, or the right of such State to regulate the use thereof, nor the right of the United States to resume possession of such lands, it being declared that all such rights shall continue to be held by the United States in trust for the people of any State or States which may hereafter be erected out of said District. The term "navigable waters," as herein used, shall be held to include all tidal waters up to the line of ordinary high tide and all nontidal waters navigable in fact up to the line of ordinary high-water mark. * * *.

SEC. 10. That any citizen of the United States twenty-one years of age * * * hereafter in the possession of and occupying public lands in the District of Alaska in good faith for the purposes of trade, manufacture, or other productive industry, may each purchase one claim only not exceeding eighty acres of such land for any one person * * * at two dollars and fifty cents per acre, * * *, and ingress and egress shall be reserved to the public on the waters of all streams, whether navigable, or otherwise: *Provided,* That no entry shall be allowed under this Act on lands abutting on navigable water of more than eighty rods: *Provided, further,* That there shall be reserved by the United States a space of eighty rods in width between tracts sold or entered under the provisions of this Act on lands abutting on any navigable stream, inlet, gulf, bay, or seashore, and that the Secretary of the Interior may grant the use of such reserved lands abut-

ting on the water front to any citizen or association of citizens, or to any corporation incorporated under the laws of the United States, or under the laws of any State or Territory, for landings, and wharves, with the provision that the public shall have access to and proper use of such wharves, and landings, at reasonable rates of toll to be prescribed by said Secretary, and a roadway sixty feet in width, parallel to the shore line as near as may be practicable shall be reserved for the use of the public as a highway: * * *: *And provided further,* That the Secretary of the Interior shall reserve for the use of the natives of Alaska suitable tracts of land along the water front of any stream, inlet, bay, or seashore for landing places for canoes and other craft used by such natives * * *.

4. The Act of May 17, 1906, 34 Stat. 197, provides:

That the Secretary of the Interior is hereby authorized and empowered in his discretion and under such rules as he may prescribe, to allot not to exceed one hundred and sixty acres of nonmineral land in the District of Alaska to any Indian or Eskimo of full or mixed blood who resides in and is a native of said district, and who is the head of a family, or is twenty-one years of age; and the land so allotted shall be deemed the homestead of the allottee and his heirs in perpetuity, and shall be inalienable and nontaxable until otherwise provided by Congress. Any person qualified for an allotment as aforesaid shall have the preference right to secure by allotment the nonmineral land occupied by him not exceeding one hundred and sixty acres.

U. S. GOVERNMENT PRINTING OFFICE: 1946